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[By Mr. Semmes.]

REPORT

OF THE

COMMITTEE ON THE JUDICIARY,

On Senate bill, No. 150.

The Committee on the Judiciary, to whom was referred the bill (S. 150,) "to limit and define the term of office of the Secretary or principal officer of each of the Executive Departments established by the several acts entitled 'An act to organize the Department of State,' 'An act to establish the Treasury Department,' 'An act to establish the War Department,' 'An act to establish the Navy Department,' 'An act to establish the Post-Office Department,' 'An act to organize and establish an Executive Department, to be known as the Department of Justice,' all of which acts were approved February 21, 1861," having duly considered said bill, respectfully report the same to the Senate with amendments and recommend that the bill, as amended, do pass.

The committee entertain no doubt as to the constitutionality of the proposed measure. The first section of the bill provides, that the term of office of the Secretary or principal officer of each one of the several Executive Departments, shall be for the same period of time as that of a member of the House of Representatives, subject to removal at the pleasure of the President, and shall expire at the end of each Congress of the Confederate States. The second section proposes to inaugurate the contemplated change in the term of office of the heads of departments on the 18th February, 1864, the day on which the term of the present Congress expires; and hence on that day are vacated the commissions of those now in office.

As the law now stands, the Secretaries hold their offices for an indefinite period of time, subject, however, to removal at the pleasure of the President. A Secretary once appointed, holds his office until removed. The legal result is, that a Secretary when once appointed and confirmed, might hold his office for twenty years, or for life, unless, in course of the successive changes of President, an incoming President might choose to remove him. The practical result of such a state of things would be, that incoming Presidents, by successively adopting the Secretaries of the outgoing President, could retain them in office for twenty years or more in spite of the united opposition of the States as represented in the Senate. This would lead to a practical nullification of the power of the Senate to revise the nominations by the President of the principal officers of the Executive Departments. It seems, therefore, that the term of office of the principal officers of the Executive Departments ought to be a matter of legislative discretion, as is the creation or establishment of the Departments themselves. It is true that the Constitution contemplates the establishment of Executive Departments, and the creation of heads or principal officers thereof, but it is silent as to the number of departments to be created, the duties to be assigned to each, or the functions to be performed by the principal officers therein, and submits the entire subject to the wisdom of the Congress, with the exception of a few duties specifically mentioned, to which attention will be hereafter directed.

The committee are of opinion, that a "Cabinet" in the sense in which that term is used in England, is unknown to our Constitution. The Secretaries or heads of Departments are improperly and loosely denominated "Cabinet officers." A "Cabinet" is understood to be a Council of State or Privy Council, authorized by the Constitution or the law to assemble and deliberate on questions of State, with a view of advising the President. Neither the Constitution, or the laws creating the Executive Departments, contemplate or authorize such an advising body. Such assemblies, it is true, have been held by Presidents of the United States, and it is believed by the President of the Confederates States, but they are the mere creations of executive pleasure, and may be composed, if the President should think fit, of unofficial persons, or be dispensed with entirely. On the other hand, the Ministry or Cabinet of Great Britain is a body known to the Constitution of that country, and is responsible for the acts of the Crown. In former years, the Privy Council of England was the constitutional adviser of the King in all weighty matters of State. Mr. Hallam says that "the resolutions of the Crown, whether as to foreign alliances or the issuing of orders and proclamations at home, or any other overt act of Government, were not finally taken without the deliberation and assent of that body (the Privy Council), whom the law recognized as its sworn and notorious counsellors." Mr. Hallam further informs us, that the Privy Council, in consequence of the number of persons composing it, fell into disuse. A Cabinet composed of a few of the prominent officers of Government was practically substituted in the place of the Privy Council. In the reign

of William Third, the distinction of the Cabinet from the Privy Council, and the exclusion of the latter from all business of State, became fully established. The feeling in favor of the old constitutional practice occasioned the introduction into the act of settlement, passed during the reign of Queen Anne, of a clause requiring that on the accession of the House of Hanover all regulations upon matters of public policy should be debated in Privy Council and signed by them, but this clause was repealed two years after; since that period, the Cabinet of England has been composed of the principal officers of the Government, and has succeeded to all the responsibility of the Privy Council. The principal members composing the English Cabinet, are the Lord Chancellor the three Secretaries of State for Home, Colonial and Foreign Affairs, and the Chancellor of the Exchequer. Other heads of Departments are sometimes called to the Cabinet, as the First Lord of the Admiralty, Postmaster General, President of the Board of Trade, President of the Board of Control, Paymaster General, Secretary of War, Chief Secretary of Ireland, Master of the Mint, and all who have been Cabinet Ministers for the last twelve years. In the ministry of Earl Grey, the Earl of Carlisle had a seat in the Cabinet without holding any office. The Commander-in-Chief was a member of the Cabinet, in 1845. Lord Mansfield, when Chief Justice, was a member of the Cabinet, but these are all exceptional cases. The Cabinet, as successor of the Privy Council, constitutes the Ministry, and is a constitutional body, directing public affairs and responsible to Parliament; hence, though the King may dismiss his ministers, the step is rarely hazarded, if the ministry be supported by a majority of the House of Commons; and on the other hand, a ministry may retain their posts in spite of the dislike of the King. At the time of the formation of the Constitution of the United States an effort was made to establish a constitutional Privy Council or Cabinet. Gouverneur Morris, seconded by Mr. Pinckney, submitted in the Federal Convention of 1787, the following propositions:

"To assist the President in conducting public affairs there shall be a Council of State, composed of the following officers:

"1. The Chief Justice of the Supreme Court.

"2. The Secretary of Domestic Affairs, who shall be appointed by the President and hold his office during pleasure.

"3. The Secretary of Commerce and Finance, who shall also be appointed by the President during pleasure.

"4. The Secretary of Foreign Affairs, who shall also be appointed by the President during pleasure.

"5. The Secretary of War, who shall also be appointed by the President during pleasure.

"6. The Secretary of Marine, who shall also be appointed during pleasure.

"7. The President shall also appoint a Secretary of State, to hold his office during pleasure.

"The President may, from time to time, submit any matter to the discussion of the Council of State, and he may require the written

opinion of any one or more of the members. But he shall, in all cases, exercise his own judgment, and either conform to such opinions or not, as he may think proper, and every officer above-mentioned shall be responsible for his opinion on the affairs relating to his particular department.

"Each of the officers above-mentioned shall be liable to impeachment and removal from office for neglect of duty, malversation, or corruption."

These propositions, (from which has been omitted, as unnecessary to the present purpose, the assignment of duties to the respective officers contained in the original,) were referred to the Committee of Detail.

The committe reported the following as a substitute for the propositions submitted to it:

"The President of the United States shall have a Privy Council, which shall consist of the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, and the principal officer in the respective departments of foreign affairs, domestic affairs, war, marine, and finance, as such departments of office shall, from time to time, be established, whose duty it shall be to advise him in matters respecting the execution of his office which he shall think proper to lay before them, but their advice shall not conclude him nor affect his responsibility for the measures which he shall adopt."

This report was again referred to the committee of eleven, which reported in lieu of all the propositions submitted, the clause as it stands in the Constitution of the United States, as follows: "And (the President) may require the opinion in writing of the principal officers in each of the Executive Departments upon any subject relating to the duties of their respective offices."

During the debate on this clause, Gouverneur Morris said, "the question of a council was considered in the committee, where it was judged that the President, by persuading his council to concur in his wrong measures, would acquire their protection for them."

It seems to the committee that the bare statement of the facts attendant on the preparation and final adoption of the clause of the Constitution of the United States above quoted, demonstrates that the framers of that constitution considered the question of establishing a Council of State, or Privy Council, or Cabinet, and deliberately abandoned the project; the argument that the President alone should be held responsible to the country for the acts of his administration prevailed, and the creation of an advisory council was considered impolitic, because it might afford the President a shelter from constitutional responsibility. The Confederate Constitution contains the same clause in identical terms; but there are other clauses relating to the heads of departments in our Constitution, which are not to be found in the Constitution of the United States and which will be presently adverted to in a different connection.

The committee are, therefore, justified in the assertion of the doctrine, that under our form of government, a cabinet has no constitu-

tional existence *as such*, and that such an advisory body is unknown to the law. The only advice which the head of a department is authorized by the Constitution to give to the President, is an *opinion in writing* when required of him *upon any subject relating to the duties of his office*. The President cannot constitutionally require of the Secretary of State an opinion upon any subject relating to the duties of the Secretary of the Navy, or the Secretary of War, nor *vice versa*; each secretary is restrained by the Constitution to giving an opinion as to matters relating to his own office and to none other. It is manifest the Constitution never contemplated an assembling of the heads of departments in cabinet council and a general discussion and decision of State affairs. Nor was this the early practice of the Government of the United States. During the administration of Washington and John Adams a cabinet meeting was rarely called; but opinions in writing were frequently required by the President and given by the respective secretaries. Mr. Jefferson first introduced the practice of holding cabinet consultations, and taking a vote as to the measures under discussion, permitting their adoption or rejection to depend on the will of a majority. And it was not until the fathers of the Constitution had passed away, that the Postmaster General and Attorney General were invited by the President of the United States to attend Cabinet Council.

The committee conclude that under the Constitution of the United States the establishment of Executive Departments was committed to the discretion of Congress. The principal officers, therefore, in such departments, were legislative officers, and their offices were subject to regulations by Congress, in *every respect* whatever, except as to the power of removal, which it was conceded the Constitution conferred on the President.

By the Constitution of the United States some officers are for a term of years and some are during good behavior, which in contemplation of law is for life; but all civil officers, whether holding for years or for life, "shall be removed from office on impeachment for and conviction of treason, bribery or other high crimes or misdemeanors." At the first session of the first Congress of the United States, the question arose as to the President's power of removal of all officers whose tenure of office was not by the Constitution itself declared for life. The debate arose upon the bill for establishing the Executive Department, denominated the Department of Foreign Affairs. The discussion was principally directed to the question, whether, if the power of removal were incident to that of appointment, the President and Senate, and not the President alone, should remove. The power of the President to remove, without the concurrence of the Senate, was sustained by both Houses, and on 27th of July, 1789, they concurred in the passage of an act in which that power is acknowledged; and this act was approved by President Washington.

Many distinguished statesmen considered this legislative decision of an important constitutional question unsatisfactory, especially as it had been carried in the United States Senate only by the casting vote of the Vice President.

It was known to be in opposition to the opinion of Mr. Madison, as expressed in the Federalist, and it was believed to have been secured by the great personal influence of President Washington.

This construction of the Constitution of the United States, though depending on so slight a foundation, was acquiesced in until the withdrawal of these States from the Federal Union; it never received, however, the sanction of any judicial decision. Under these circumstances, the framers of the Constitution of the Confederate States, determined to settle the question definitely, by inserting the clause respecting removals from office, which is to be found in the Constitution. It is in these words.

"The principal officer in each of the Executive Departments and all persons connected with the diplomatic service, may be removed from office at the pleasure of the President. All other civil officers of the Executive departments, may be removed at any time by the President or other appointing power when their services are unnecessary, or for dishonesty, incapacity, inefficiency or neglect of duty, and when so removed, the removal shall be reported to the Senate together with the reason therefor. Art 2, sec. 2, clause 3.

These observations, as to the power of removal, have been made merely for the purpose of establishing the fact, that the insertion of the removal clause in our constitution, was intended to settle a grave constitutional dispute as to the power of the President to remove an executive officer without the concurrence of the Senate, as well as to restrain him in the exercise of that power, as to all the civil officers, except those connected with the diplomatic service and the principal officers of the Executive departments. This clause was not intended to abridge, and does not abridge, the legislative discretion of Congress in regulating the tenure of all legislative offices created by it.

To create an office, and regulate its tenure, is an exercise of legislative powers; to remove an officer is an *executive* act. The power to fix the tenure of office, is as distinct and different from the power of removal, as is the power to remove from the power of impeachment.

The power of impeachment is exercised only in cases of treason, bribery, or other high crimes and misdemeanors; the power of removal may be resorted to for inefficiency, incapacity or neglect of duty, and both powers may be exercised to remove an officer, whether he holds his office for a term of years, or at the will of the Executive. So far, then, as the principal officers of each of the Executive departments are concerned, the Confederate Constitution has made no change as to their tenure of office; it has merely expressly declared, what was tacitly included in the Constitution of the United States, to wit: that they may be removed from office at the pleasure of the President. At the commencement of the Government of the United States the tenure by which all executive officers held their offices, was a tenure at the will of the President, because the laws creating the offices did not limit the term of office. Such was the case not only as to the heads of departments, but as to collectors, marshals, district attorneys, and other officers. On the 15th May, 1820, the Congress passed a law, declaring that the commissions of all marshals, collectors, district

attorneys, &c., then in office, should be vacated at a certain date, and thereafter the tenure of these offices should be for four years, removable at the pleasure of the President. If the Congress had deemed it expedient, the heads of departments might have been included in the act of 1820, for certainly the Constitution of the United States imposes no restraint on the legislative will as to the term of office of the principal officers of the Executive Department. The power of Congress under the Constitution of the United States to affix a term to the office of marshal, or to the office of Secretary of State is the same; both are legislative creations, to be moulded subject to the legislative will, except as to the power of removal on the part of the Executive, which, being conferred by the Constitution, cannot be impaired by the legislature.

When an office is created with a tenure for a term of years, it is the intention of the legislator that the officer should retire from office at a definite period, by *virtue of the legislative will* and *without the interposition of the Executive*; and this constitutes the difference between an office whose tenure is for a term of years, removable at the pleasure of the President, and an office held at the will of the President; the latter can never become vacant except by death, resignation or the interposition of executive power. It is very important that the tenure of office of all disbursing officers should be for a term of years, in order to secure a periodical investigation and settlement of their accounts and the renewal of their bonds.

In confirmation of the opinion expressed as to the constitutional power of Congress to limit the term of office of the heads of departments, it will be observed, that in the project for a privy council, submitted by Gouverneur Morris to the convention of '87, he expressly declares that the term of office of the secretaries shall be *during the pleasure of the President*; when, however, the Committee on Detail report back the proposition, the *tenure of office* is omitted, and the establishment of the proposed departments is expressly left to the discretion of Congress without limitation, except as to the number and denomination of the departments.

In the clause of the Constitution actually adopted, even that limitation is excluded, and the whole subject is committed to the will of the Legislative Department of the Government.

The power of Congress being conceded, the policy of exercising the power of limiting by law, the duration of the term of office of the heads of departments, remain to be considered. If there be no limitation whatever, the incoming Presidents, by adopting the heads of departments of the out going Presidents, might, for many years, retain in office individuals obnoxious to the States, as represented in the Senate. The expiration of the term of office of the President, does not, of itself, operate the dismissal of the secretaries selected by him. They remain in office until dismissed by himself or some succeeding President. It is certainly desirable that the Senate should have the power of revising the conduct of these officers, at least at the expiration of the term of office of each President. To such a proposition no objection can be perceived. Why should the opportunity for re-

vision be so long delayed? It is suggested that these officers are but the organs of the Executive, and a revision of their conduct, is but an arraignment of the President. This would be true, if the heads of departments were *solely* the organs of the Executive will, but such is not the case; some duties are imposed on them by the Constitution and other and more numerous and perhaps more important duties are prescribed by law. In the case of Morbury *vs.* Madison, (1 Cranch,) the Supreme Court of the United States, through C. J. Marshall, the organ of the court, says: "It is the duty of the Secretary of State to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts in this respect, as has been very properly stated at the bar, under the *authority of law* and *not by the instructions of the President.*"

Our Constitution provides that, "Congress shall appropriate no money from the treasury except by a vote of two-thirds of both houses, taken by yeas and nays, *unless it be asked and estimated for by some one of the heads of departments* and submitted to Congress by the President" This is an important and delicate constitutional duty. The Secretary must ask an estimate for money and the President must submit the estimate, before a majority of Congress can make an appropriation. In the performance of this duty, the head of the department is not the organ of the Executive will, but is a guardian of the treasury created by the Constitution.

The President may require "the opinion, in writing, of the principal officer in each of the Executive Departments upon any subject relating to the duties of their respective offices." It will be observed that the Constitution here provides for an opinion *in writing*. The secretaries are thus made the constitutional advisers of the President on any subject relating to the duties of their respective offices. Why is the opinion required to be in writing? Evidently to subject the officer giving it, to responsibility as its author.

This responsibility is not to the President alone, as would be the case were he the mere organ of the President's will, but to the country also, for the truth, justice and propriety of the opinion given.

The second section of the act, to establish the Treasury Department, enumerates a variety of duties to be performed by the Secretary of the Treasury, and specially provides that it shall be his duty "to make reports and give information to the Congress or the President in person, or in writing, as may be required concerning all matters referred to him by the Congress or the President, respectively, and generally to perform all such services relative to the finances, and all such other duties as he may, by law, be directed to perform." So far as this officer is concerned, most of his duties are prescribed by law, and as to such duties he is an officer of the law, and not a mere agent of the President. Such is also the case so far as the Postmaster General and Attorney General are concerned. It is true that the law, establishing the State, War and Navy Departments, contemplates that the heads of these departments shall act under the instructions of the President, yet, in other statutes, many duties are imposed on the Secretary of War and the Secretary of the Navy,

which render them, as to those duties, the officers of the law and not the mere organs of Executive will.

It seems, therefore, to the Committee, that as to the duties imposed by the Constitution or the laws on the heads of departments, the conduct of those officers may very properly become the subject of scrutiny and revision without infringment on the constitutional independence of the Executive.

The Constitution contemplates that the Senate, as the representative of the States, shall be consulted in the appointment of all the important officers of the Government. This power was given to the Senate as a check on Executive caprice. The Senate is not required to assign any reason for the rejection of a nomination, nor is the President bound to communicate to the Senate the motives inducing him to make a nomination. It would not be considered a violation of the spirit of the Constitution for the Senate to reject a nomination because the person nominated was distasteful to the public. If a person so nominated was known to be negligent or, in any manner, inefficient, it would be the duty of the Senate to reject his nomination. Why, therefore, should a law be considered objectionable which, from time to time, afforded an opportunity to the constitutional adviser of the President, in the exercise of his appointing power, to revise the conduct of officers? If, on the expiration of the term of an officer, the President desires to continue him in office, he can re-nominate him and accomplish his object.

The term of office of the President of the United States is for four years; that of the President of the Confederate States is for six years. Under the Government of the United States, obnoxious or inefficient secretaries could not be retained in office for a longer period than four years, because the removal of the President by the election of his successor secures a change of the heads of departments.

The evils resulting from inefficient administration of the Executive Departments in a time of profound peace might well be borne for four years without much detriment to the public interest. The duration, however, of such evils for a period of six years would render them intolerable and pernicious especially in time of war. The object of this bill is to arrest inefficient administration at the expiration of two years in case the head of a department should, in the estimation of the country, prove himself deficient in the qualities necessary to a vigorous and intelligent discharge of the duties imposed on him by law. As to those duties, the President has not been constituted by the Constitution the sole judge of the administrative capacity of the heads of departments. For the efficient discharge of such duties the responsibility of the head of a department is two fold; he is responsible to the President, who can exercise the power of removal; and he is responsible to the people who can only exercise their power through the legislative department of the Government by limiting the term of office, and requiring his nomination to be again subjected to the scrutiny of the Senate. In no other mode can responsibility to the people for infficiency be secured, because an officer cannot be impeached except for treason, bribery or other high crimes and misde-

meanors. This double responsibility commends itself, because of the salutary influence it is calculated to exercise on the officer. When he is aware that, in order to retain his office, its duties must be discharged not only to the satisfaction of the Executive, who may be lenient, but also to the satisfaction of the States, as represented in the Senate, his attention will be stimulated and his energies quickened. The exercise of this power by the Senate cannot interrupt or embarass the general policy of the Executive, because that policy will be impressed on the Government by any head of department who may be nominated by the President and confirmed by the Senate. The Senate could not expect to defeat the general policy of the Executive, by rejecting his nomination, for the reason that any one, selected by the President must necessarily reflect his policy as the organ of his will. The experience of the old Government has demonstrated that the President has been allowed to select the heads of Departments acceptable to him as exponents of his general policy, notwithstanding that policy has frequently been opposed to the views of a majority of the Senate. There is no reason to suppose that the Confederate Senate would pursue a different course. Indeed, the provision in our Constitution, which requiries appropriations of money to be asked for and estimated by the heads of departments, in order to secure their passage by a majority of Congress, operates as a bridle in the hands of the President on an unruly Senate, so far as to restrain it from resorting to factious rejections of his nominations. If the Senate rejected the nominations of the Executive, because it disapproved of his policy, it would be driven to reject any person selected by the President, and the result would be a disorganization of the Goverment, because of the failure of appropriations. Besides, if a supposed factious rejection of all nominations be considered an objection to the passage of this bill, the argument applies as well to original nominations as to re-nominations. It is, therefore, rather an argument against the constitutional provision requiring the concurrence of the Senate in appointments, than against the bill which contemplates a frequent exercise of the constitutional authority of the Senate. It is urged, however, that this bill will subject the President to the control of an olligarchy in the Senate If this be true, it is an objection to the Constitution itself, because that instrument has constituted the Senate a part of the appointing power, by requiring the President to submit his nominations to it for advice and consent. The Senate is the only constitutional check on the Exeecutive will in making appointments, and if that check be withdrawn, none other can be interposed. The bill now reported, merely provides for a healthful exercise of this constitutional check, and those who object to it on the ground alleged, would seem to favor the withdrawal of all restraint on Executive pleasure, by repealing that clause of the Constitution requiring the concurrence of the Senate in Executive appointments. This bill, if passed, will prevent the retention for a longer period than two years of the head of a department who may become obnoxious to the country. The accomplishment of this object is certainly not inconsistent with our form of government. Mr. Burke truly says, "it would be dreadful indeed if there was any

power in the nation capable of resisting its unanimous desire, or even the desire of any very great and decided majority of the people. The people may be deceived in their choice of an object. But I can scarcely conceive any choice they can make to be so very mischievous as the existence of any human force capable of resisting it."

It may be urged that the proposed measure is novel, and therefore objectionable. This objection applies to all political reforms, and is but the usual appeal to the wisdom of our ancestors, made by those who oppose all improvements in government. While respecting the experience of our predecessors, the committee entertain no superstitious reverence for the past. In the present state of our knowledge, politics, so far from being a science, is one of the most backward of all the arts. Politicians should modify their schemes, not according to the notions of their ancestors, but to the actual exigencies of the times, for men, urged by a sense of their own progress, are growing weary of the idle talk about the wisdom of their ancestors. For these reasons the majority of the Judiciary Committee have determined to recommend to the favorable consideration of the Senate the bill now reported.

THOS. J. SEMMES,
On behalf of the Committee.